(1) Supreme Court, U.S.
FILED

99 1036 DEC 16 1999

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TREASURE CHEST CASINO, et al.,
Petitioners,

v.

DENNIS MULLEN, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM J. KELLY III *
ADAMS AND REESE LLP
4500 ONE SHELL SQUARE
NEW ORLEANS, LA 70139
(504) 581-3234

Counsel for Petitioners

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

8QP

QUESTION PRESENTED

Do the Seventh Amendment and Federal Rule of Civil Procedure 23(b)(3) permit a district court to certify a class that will necessarily require different juries to adjudicate separately the inextricably intertwined issues of negligence, proximate cause, and comparative negligence, where various class representatives attribute their purported injury to various and discreet causes?

PARTIES TO THE PROCEEDING

Petitioner

The Petitioner in this case is defendant, Treasure Chest Casino, LLC ("Casino").

Respondents

The Respondents are Dennis Mullen, Sheila Bachemin and Margaret Phipps, the plaintiff class representatives.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 4

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE CASINO'S SEVENTH AMENDMENT RIGHTS HAVE BEEN VIOLATED 4

II. THIS COURT SHOULD GRANT CERTIORARI TO PRECLUDE CIRCUIT COURTS FROM SPLITTING NEGLIGENCE FROM CAUSATION AND COMPARATIVE NEGLIGENCE INTO SEPARATE TRIAL PHASES TO CIRCUMVENT THE REQUIREMENTS OF RULE 23(b)(3) 15

III. THE JUDGMENT DEFIES THE CLEAR HOLDINGS OF AMCHEM AND ORTIZ WITH REGARD TO THE ADEQUACY OF REPRESENTATION 24

CONCLUSION 26

APPENDIX

Appendix A
Court of Appeal's Opinion - 8/19/99 . . . . . 1a

Appendix B
District Court Order & Reasons - 8/29/97 . . . . 29a

Appendix C
Court of Appeal's Order on Petition for Rehearing - 9/17/99 . . . . . 44a

TABLE OF AUTHORITIES

Cases

Allison v. Citgo Petroleum Corp.
151 F.3d 402 (5th Cir. 1998) 19

Amchem Products, Inc. et al. v. Windsor et al.
521 U.S. 591, 117 S.Ct. 2231,
65 U.S.L.W. 4635 (1997) . . . . . *passim*

Atlantic and Gulf Stevedores, Inc. v.
Ellerman Lines, Ltd.
369 U.S. 355, 82 S.Ct. 780 (1962) 7

Baltimore & Carolina Line, Inc. v. Redman
295 U.S. 654, 55 S.Ct. 890 (1935) 6

Barnes v. The American Tobacco Co.
176 F.R.D. 479 (E.D. Pa. 1997)
aff'd, 161 F.3d 127 (3d Cir. 1998),
cert. denied, 119 S.Ct. 1760, 143
L.Ed.2d 791 (1999) 21, 23

Beacon Theatres, Inc. v. Westover
359 U.S. 500, 79 S.Ct. 948 (1959) 8

Castano v. American Tobacco Co.
84 F.3d 734 (5th Cir. 1996) 4, 19

Chauffeurs, Teamsters and Helpers,
Local No. 391 v. Terry
494 U.S. 558, 110 S.Ct. 1339 (1990),
quoting Parsons v. Bedford, 3 Pet. 433,
447, 7 L.Ed. 732 (1830) 7

Cimino v. Raymark Industries, Inc.
151 F.3d 297 (5th Cir. 1998) 13

Curtis v. Loether
415 U.S. 189, 94 S.Ct. 1005 (1974) 9

Dairy Queen, Inc. v. Wood
369 U.S. 469, 82 S.Ct. 894 (1962) 8

Dimick v. Schiedt
293 U.S. 474, 55 S.Ct. 296 (1935) 8, 9

Gavagan v. United States
955 F.2d 1016 (5th Cir. 1992) 19, 22

Gen. Tel. Co. of the Southwest v. Falcon
457 U.S. 147, 102 S.Ct. 2364 (1982) 24

Granfinanciera, S.A. v. Nordberg
492 U.S. 33, 109 S.Ct. 2782 (1989) 9

In re Fibreboard
893 F.2d 706 (5th Cir. 1990) 18

In re Hotel Tel. Charges
500 F.2d 86 (9th Cir. 1974) 18

In re Joint E.& S. Dist. Asbestos Litigation
982 F.2d 721 (2nd Cir. 1992) 24

In the Matter of Rhone-Poulenc Rorer Inc.
51 F.3d 1293 (7th Cir. 1995) 11, 13

Kline v. Coldwell Banker
508 F.2d 226 (9th Cir.)
cert. denied,421 U.S. 963 (1974) 18

National Super Spuds v. New YorkMercantile Exchange
660 F.2d 9 (2nd Cir. 1981) 24

Ortiz v. Fibreboard Corp.
119 S.Ct. 2295,
144 L.Ed. 2d 715 (1999) 24, 25

Schulz v. Pennsylvania R.R. Co.
350 U.S. 523, 76 S.Ct. 608 (1956) 7

Statutes

Federal Rule of Civil Procedure 23(a)(4) 24
Federal Rule of Civil Procedure 23(b)(3) . . . . . *passim*
46 U.S.C. § 688, Jones Act 7
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1292(b) 2, 15
28 U.S.C. § 2072(b) 15, 23
28 U.S.C. § 2106 1

Other Authorities

Harper, Jones & Gray, The Law of Torts
(2d ed. 1986) 22

Leslie W. O'Leary, "Mass Tort Class Actions:
Will Amchem Spawn Creative Solutions?"
65 Def. Couns. J. 469 (1998) 15

Nicolas P. Terry, "Collapsing Torts,"
25 Conn. L. Rev. 717 (1993) 21

OPINIONS BELOW

The opinion of the Court of Appeal (Appendix A) is reported at 186 F.3d 620. The memorandum "Order and Reasons" of the district court approving class certification (Appendix B) is not reported.

JURISDICTION

The judgment of the Court of Appeal denying Petitioner's application for Rehearing En Banc and "[t]reating the Petition for Rehearing En Banc as a Petition for Panel Rehearing," (Appendix C) was entered on September 17, 1999. This Petition for Writ of Certiorari is filed within ninety (90) days of the denial of the Application for Rehearing En Banc, which was treated as a Petition for Panel Rehearing. This Court's jurisdiction is therefore invoked pursuant to 28 U.S.C. § 1254(1) and 2106.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Pertinent provisions of the Seventh Amendment, the Rules Enabling Act, and Fed. R. Civ. P. 23 are set forth in the text of the Petition.

STATEMENT OF THE CASE

Treasure Chest Casino ("Casino") appealed an order certifying a class of its current and former employees who suffer some form of "occupational respiratory illness" as a result of an allegedly defective ventilation system on board the M/V TREASURE CHEST CASINO. Plaintiffs allege that the ventilation system renders the vessel unseaworthy under the general maritime law and sue for maintenance and cure

under the Jones Act. However, each of the three class representatives has widely varying complaints about what has caused their various ailments. Mullen and Bachemin complain of second hand smoke. (App. A, p. 26a). Phipps complains of dust on air vents, garbage and debris, and germs on employee radios. Ibid. Mullen points to the Casino's temperature. Ibid. Bachemin complains of paint fumes. Ibid. No two complaints are alike.

Moreover, it is beyond dispute that the respiratory illnesses of which plaintiffs complain are not uniquely caused by a casino environment, a riverboat environment, a vessel, or any other condition which might connect a "respiratory illness" to the Casino or its ventilation system. Evidence in the record shows that virtually every American has experienced bronchitis, allergies, a common cold, a runny nose, hay fever, asthma, and every other condition complained of in this case. (Petitioner's Original Brief, p. 17; Reply Brief p. 1.) This is not surprising, as the potential sources of those conditions are unlimited and can be caused by anything and everything in any environment, anywhere in the world. Ibid. Thus, there is no allegation in this case that the diseases alleged have any sort of "medical footprint" (or causal connection) that can uniquely tie the class member's specific complaint to the air aboard the Casino.

On June 25, 1997, the district court conducted its hearing on class certification. On September 2, 1997, the district court issued its "Order and Reasons" ("Order") certifying this matter as a class action. (App. B, p. 28a). The Casino appealed pursuant to 28 U.S.C. § 1292(b) and on August 19, 1999, a Panel of the Fifth Circuit Court of Appeal affirmed class certification in a 2-1 decision, opining that a Phase I jury could adjudicate the "common" issue of the Casino's negligence by determining whether the ventilation

system was defective. (App. A, p. 12 a - 14a). The Court of Appeal contemplated that different juries could then in Phase II separately adjudicate proximate cause, comparative negligence, and damages for each of the approximately 100 to 200 class members.[1] Id.

Under the trial procedure contemplated by the Court of Appeal,[2] assuming that the Phase I jury found the ventilation system to be defective, approximately 30 successive juries would have to determine in Phase II whether each of the class members' widely varying ailments were proximately caused by the defect in the ventilation system.[3] Moreover, because the 30 successive juries could not know the precise basis upon which the Phase I jury found the ventilation system to be defective, each of these juries would necessarily have to hear this evidence again in order to determine proximate cause. For example, if the ventilation system was found to be defective because it did not

---

[1] See also Order, App B, pp. 33a-34a, in which the District Court notes that Plaintiffs claim that there are 200 potential class members, but that Plaintiffs have presented evidence that the number of potential claimants will be between 100 to 150 persons.

[2] The District Court did not adopt a specific trial plan beyond noting its "option" to bifurcate common issues from individual ones if necessary. (App. B, pp. 38a-39a). The Casino argued on appeal this was itself a reason that class certification was improper. The Court of Appeal rejected this argument without discussion, instead itself suggesting its own trial plan (which the Casino shows here is unconstitutional). See p.5, infra.

[3] Assuming a median number of 150 plaintiffs and trials of five plaintiffs at a time, there would be 30 trials in Phase II, each with a separate jury.

adequately filter dust or germs, the successive juries would have to hear this evidence in order to determine whether this could have proximately caused a class member's ailment allegedly related only to second-hand smoke.

In a dissenting opinion, Judge Emilio Garza cited the Seventh Amendment and Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996) to explain that the "superiority" requirement of class certification was not satisfied because Phase II juries would necessarily have to reconsider the Casino's negligence, notwithstanding the Phase I jury's prior adjudication of this same issue. (App. A, pp. 26a-27a). Judge Garza explained that this reconsideration of issues by separate juries not only prevents a class action from being superior, it also violates the Casino's Seventh Amendment right to have a single jury consider a common factual issue. Ibid.

On September 2, 1999, the Casino filed its Petition for Rehearing En Banc in the Court of Appeal. On September 17, 1999, the Court, treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, denied the Petition. (App. C, p. 44a).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE CASINO'S SEVENTH AMENDMENT RIGHTS HAVE BEEN VIOLATED.

Defendant appealed the Rule 23(b)(3) certification based, in part, on the district court's lack of any specific trial plan in its Order and Reasons. (App. B, p. 39a). In its decision, the district court found that superiority was met

because the Court "has the option of bifurcating the legal and factual questions common to the proposed class from the questions unique to the individual members." Ibid. It did not order bifurcation, however, and it did not identify what issues might be tried in which phases. Ibid. On appeal, the Casino argued:

> In the absence of any trial plan, articulated theory of recovery, or other indication of how this case will proceed on issues of liability for each class member, there can be no determination of whether the class action is a superior procedural device.

(Casino's Original Brief for Appellant p. 8).[4] Rather than reversing the decision due to the lack of any trial plan, however, the Court of Appeal affirmed certification and ordered a bifurcated trial before separate juries in separate phases. (App. A, p. 15a). The Court then asserted that it had avoided any prohibited Seventh Amendment deprivation "by leaving all issues of causation for the phase-two jury." (App. A, p. 16a). It held that when a jury considers comparative negligence, "the focus is upon causation" and therefore, according to the Court's logic, the separate juries will not be considering overlapping issues of fact and law. (App. A, p. 16a). But as its name suggests, the doctrine of comparative negligence in this type of case mandates that the plaintiff's own negligence be compared to the conduct of the defendant. Ordering separate juries to consider such inextricably

---

[4] See, also, App. A, p. 12a, in which the Court of Appeal's decision acknowledges this argument: "Treasure Chest argues that the district court abused its discretion by failing to adequately consider how a trial on the merits would be conducted."

intertwined issues of fact is a violation of the Seventh Amendment.

A. The Seventh Amendment guarantees the right to a trial by jury.

The Seventh Amendment to the United States Constitution guarantees litigants the right to a trial by jury in most types of cases. It provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The Seventh Amendment explicitly guarantees not only the basic right to have a case tried by a jury, but also the equally important parallel right that the determinations of one jury will not be undermined by reexamination by another jury. As this Court has explained, "the amendment not only preserves that right but discloses a studied purpose to protect it from indirect impairment through possible enlargements of the power of reexamination existing under the common law . . . ." Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657, 55 S.Ct. 890, 891 (1935). Accordingly, once a jury in a case issues a finding of fact, it is generally unconstitutional for a subsequent jury in the same case to reconsider the same issues that have already been tried by the first jury.

The Seventh Amendment right to a trial by jury squarely applies to the case at hand. The phrase "Suits at common law" has been frequently interpreted by this Court to mean suits in which legal rights are to be ascertained and determined. In other words, "the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 564, 110 S.Ct. 1339, 1344 (1990), quoting Parsons v. Bedford, 3 Pet. 433, 447, 7 L.Ed. 732 (1830). Moreover, the "right extends to causes of action created by Congress." Terry at 565, 110 S.Ct. at 1344. For example, there is a Seventh Amendment right to a jury trial on any claim brought pursuant to the Jones Act, 46 U.S.C. § 688, such as the claims in the instant case. Schulz v. Pennsylvania R.R. Co., 350 U.S. 523, 523, 76 S.Ct. 608, 609 (1956); Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 360, 82 S.Ct. 780, 784 (1962).

Accordingly, in a case such as this one a litigant has a constitutional right to a trial by jury, and it is unconstitutional to indirectly impair that right by allowing a subsequent jury to reexamine an issue that has already been decided by a previous jury.

B. This Court will grant certiorari when a Seventh Amendment right to a jury trial is in jeopardy.

The right to a trial by jury is a cornerstone of our judicial system. Accordingly, this Court has expressed -- in the strongest of terms -- the importance of safeguarding this right: "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history

and jurisprudence that **any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.**" Dimick v. Schiedt, 293 U.S. 474, 486, 55 S.Ct. 296, 301 (1935) (emphasis added).

Because this right is so fundamental, this Court has frequently emphasized that courts should go out of their way to safeguard this right. For courts of appeal, this means that they are instructed to exercise the extraordinary remedy of mandamus to remedy any potential curtailment of the right to a jury trial. As this Court has stated, "whatever differences of opinion there may be in other types of cases, we think that the right to grant mandamus to require jury trial when it has been improperly denied is settled." Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 511, 79 S.Ct. 948, 957 (1959). And this Court subsequently stated that Beacon Theatres "**emphasizes the responsibility** of the Federal Courts of Appeal to grant mandamus where necessary to protect the constitutional right to trial by jury . . . ." Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472, 82 S.Ct. 894, 897 (1962) (emphasis added).

For this Court, the fundamental nature of the right to a jury trial means that this Court should grant certiorari to remedy the curtailment of that right. For example, this Court granted certiorari in Beacon Theatres because "any seeming curtailment of the right to a jury trial should be scrutinized with utmost care." 359 U.S. at 501, 79 S.Ct. at 952, quoting Dimick, supra. Likewise, in Dairy Queen, this Court "granted certiorari because the action of the Court of Appeal seemed inconsistent with protections already clearly recognized for the important constitutional right to trial by jury in our previous decisions." 369 U.S. at 470, 82 S.Ct. at 896.

This Court similarly decided -- "[i]n view of the importance of the jury trial issue" in Civil Rights Act of 1968 cases -- to grant certiorari in Curtis v. Loether, 415 U.S. 189, 191, 94 S.Ct. 1005, 1007 (1974). And even when the right to a jury trial was somewhat unclear, this Court has "granted certiorari to decide whether petitioners were entitled to a jury trial . . . ." Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 38, 109 S.Ct. 2782, 2788 (1989).

Considering that this Court has "emphasized the responsibility" of courts of appeal to use the extraordinary remedy of mandamus to protect the right to a jury trial, and considering that this Court has itself not hesitated to grant certiorari on numerous occasions when there was any "seeming curtailment" of the right to a jury trial, the need for this Court to grant certiorari is unquestionable in cases in which the Seventh Amendment right to a jury trial is endangered.

This is one of those cases.

C. The trial plan adopted by the Court of Appeal violates the Casino's Seventh Amendment rights, and thus this Court should grant certiorari.

This is a case in which there has been at least a "seeming curtailment" of the Casino's Seventh Amendment right to a jury trial. Dimick, 293 U.S. at 486, 55 S.Ct. at 301. In an attempt to justify the fairness of class certification, the Court of Appeal adopted a trial plan in this case that had not been adopted by the trial court -- a trial plan that unconstitutionally calls for the reexamination of the verdict of a Phase I jury by a Phase II jury. (App. A, pp. 14a-17a). For this reason, this Court should grant certiorari.

When the District Court in this case granted class certification, it decided not to adopt any specific trial plan, instead simply noting that it had "the option" to decide in the future to bifurcate common issues from individual issues if necessary. (App. B, p. 39a). Indeed, the Casino argued in its appeal to the Court of Appeal that the absence of a trial plan was itself a fatal flaw with the District Court's approach and thus a reason to reverse class certification. (See, p. 5, supra).

But instead of acknowledging this flaw in the trial court's opinion, the Court of Appeal decided to adopt a trial plan itself. In Phase I, a jury would decide whether the Casino was negligent and/or whether the Casino was unseaworthy because of a faulty ventilation system. Phase I would not include any finding that the conditions on the Casino did cause any injury, but instead only that they could potentially cause injury for one or more class members. In Phase II, different juries would decide whether this negligence and/or unseaworthiness actually did cause any injuries to specific class members, and the degree to which the negligence and/or unseaworthiness was the cause of the class member's injury as opposed to some other contributing cause including the comparative negligence of the class member himself. See Mullen, (describing trial plan), (App. A, 14a-17a), 186 F.3d at 628-29.[5]

---

[5] Equally problematic is the means by which the Court of Appeal reached its decision as to the Seventh Amendment. Even if a doctrinal distinction between negligence and comparative negligence does exist, such does not alone end the inquiry of whether factual issues are so intertwined as to prevent their separate consideration under the Seventh Amendment. The decision may be used by future courts as a license to evade Seventh Amendment scrutiny.

For example, under the Court of Appeal's trial plan, a Phase I jury might decide that the Casino was negligent and/or unseaworthy because the ventilation system failed to adequately ventilate tobacco smoke, because of the presence of dust on the air vents, and because of the temperature being too hot, and the jury might further decide that there was no negligence or unseaworthiness with regards to the other complaints of the named plaintiffs (e.g., paint fumes, cold temperature and germs on radios). In Phase II, an individual class member whose claim is being tried by a separate jury could then try to show that he suffered injuries as a result of tobacco smoke and/or dust on air vents. The Casino might then rebut these claims by showing, among other things, that the class member's injuries were primarily the result of exposure to tobacco smoke, dust or any of millions of other air contaminants at places other than the Casino, places at which others were responsible for the air quality (maybe the plaintiff himself). After all, there is no dispute that the respiratory illnesses of which plaintiffs complain are not unique to riverboat casinos -- evidence in the record shows that virtually every American has experienced bronchitis, allergies, a common cold, a runny nose, hay fever, asthma, and every other condition complained of in this case as a result of a multitude of causes. (App. A, 23a).

Because the same facts regarding the Casino's conduct would be examined by both the Phase I jury (in deciding negligence) and the Phase II juries (in deciding proportional fault and comparative negligence), the Court of Appeal's trial plan violates the Seventh Amendment. The Seventh Circuit explained this problem with absolute clarity in a case in which it granted a writ of mandamus and instructed a district court judge to decertify a class because of Seventh Amendment problems. In the Matter of Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995). The trial plan at issue in Rhone-

Poulenc was similar to the trial plan embraced by the Court of Appeal in this case. As the Seventh Circuit explained, "the first jury will not determine liability. It will determine merely whether one or more of the defendants was negligent under one of the two theories." Id. at 1303. Afterwards, "a second (and third, and fourth, and hundredth, and conceivably thousandth) jury will have to decide, in individual follow-on litigation by class members . . . such issues as comparative negligence -- did any class members knowingly continue to use unsafe blood solids after they learned or should have learned of the risk of contamination with HIV? -- and proximate causation." Id. Such a plan, the Seventh Circuit held, "is inconsistent with the principle that the findings of one jury are not to be reexamined by a second, or third, or nth jury." Id. The Court explained:

> Both issues overlap the issue of the defendants' negligence. Comparative negligence entails, as the name implies, a comparison of the degree of negligence of plaintiff and defendant. Proximate causation is found by determining whether the harm to the plaintiff followed in some sense naturally, uninterruptedly, and with reasonable probability from the negligent act of the defendant. It overlaps the issue of the defendants' negligence even when the state's law does not (as many states do) make the foreseeability of the risk to which the defendant subjected the plaintiff an explicit ingredient of negligence. A second or subsequent jury might find that the defendants' failure to take precautions against infection with Hepatitis B could not be thought the proximate cause of the plaintiffs' infection

> with HIV, a different and unknown blood-borne virus. How the resulting inconsistency between juries could be prevented escapes us.

Rhone-Poulenc, 51 F.3d at 1303 (citations omitted).

The Seventh Circuit's analysis and holding in Rhone-Poulnec was correct, and it cannot be reconciled with the holding of the Court of Appeal in the instant case. The Court of Appeal simply did not grasp the problem noted by the Seventh Circuit. The court mistakenly thought that the Phase II jury would not reexamine the findings of the Phase I jury merely because the element of the cause of action that the Phase I jury would decide was only "whether Treasure Chest's conduct was negligent or the Casino unseaworthy" whereas the cause of action element that the Phase II jury would decide was "only the degree to which those conditions were the sole or contributing cause of the class member's injury." (App. A, p. 16a). Based on this purported distinction, the court erroneously concluded that "no Seventh Amendment implications affect our review of the district court's superiority finding." Id. Indeed, the decision of the Court violates its own well-known precedent in Cimino v. Raymark Industries, Inc., 151 F.3d 297, 321 (5th Cir. 1998).

But the Seventh Amendment does not say that it merely bars the re-trial of an element of a cause of action. Instead, it prohibits the retrial of facts: "no fact tried by a jury shall be otherwise reexamined" by another jury. U.S. Const. Amend. VII. A Phase I jury will have to consider facts relating to the Casino's conduct to determine whether that conduct rose to the level of negligence. Likewise, to determine unseaworthiness, the Phase I jury will have to consider facts concerning the conditions on the ship to decide

whether those conditions were sufficiently bad to rise to the level of unseaworthiness. In Phase II, these exact same facts would have to be reexamined and reanalyzed. To determine comparative negligence, a Phase II jury will have to decide once again how bad the conduct of or conditions on board the Casino were in order to compare it to other conduct or conditions, including the plaintiff's own conduct in the case of contributory negligence. The Court of Appeal was wrong to conclude that because one jury is told to decide "negligence" and another jury is told to decide "contributory and comparative negligence," this means that no fact tried by one jury would be reexamined by a second jury. This was fully recognized by the Seventh Circuit, and the split between the Seventh and Fifth Circuits on this critical issue supports the granting of certiorari.

In addition to conducting a flawed Seventh Amendment analysis, the Court of Appeal incorrectly suggested that it might be unnecessary to worry about the Seventh Amendment because the right to a jury trial had not been argued on appeal. (App. A, pp. 15a-16a).[6] The Court of Appeal's majority opinion ignores that the Seventh Amendment could not be a ripe issue on appeal to that court when a trial plan had yet to be adopted. Indeed, the Casino urged the district court to adopt a trial plan, and the Casino argued on appeal that the very lack of a trial plan was a basis to any class certification. (See, p. 5, supra).

Further, because of the very language in the Court of Appeal's majority opinion regarding the Seventh Amendment, the Casino has, at least up to this point, been deprived of its fundamental Seventh Amendment rights without even having

---

[6] Despite the suggestion, the Court of Appeals held that its trial plan did not violate the Seventh Amendment.

had a full and fair hearing on these rights. This is because the Seventh Amendment was not even at issue until the Court of Appeal issued its opinion, and yet in this same opinion the Court of Appeal suggests that the Casino somehow waived any Seventh Amendment argument. This simply cannot be. Given that the Seventh Amendment right is a fundamental right, this in and of itself supports the granting of certiorari.

II. THIS COURT SHOULD GRANT CERTIORARI TO PRECLUDE CIRCUIT COURTS FROM SPLITTING NEGLIGENCE FROM CAUSATION AND COMPARATIVE NEGLIGENCE INTO SEPARATE TRIAL PHASES TO CIRCUMVENT THE REQUIREMENTS OF RULE 23(b)(3).

A. The class members in this class were undisputedly exposed to different conditions for different amounts of time in different ways, yet the Court of Appeal found this irrelevant to the Rule 23(b)(3) analysis.

There are those who commend "creative solutions" to this Court's holding in Amchem Products, Inc. et al. v. Windsor et al., 521 U.S. 591 , 117 S.Ct. 2231, 138 L.Ed. 2d 689, 65 U.S.L.W. 4635 (1997). See, Leslie W. O'Leary, "Mass Tort Class Actions: Will Amchem Spawn Creative Solutions?" 65 Def. Couns. J. 469 (1998). Indeed, this Court warned of a tendency for courts to be "ever more 'adventuresome'" in applying Rule 23 and reminded courts that the Rules Enabling Act instructs that rules of procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b); Amchem, 117 S.Ct. at 2244.

The Court of Appeal's decision at issue represents a creative solution to the clear holding of Amchem. It

dismisses the varying degrees of exposure, the lack of any causal connection or "medical footprint" that might support a finding of liability between the actions of the defendant and the purported injury of the plaintiff, and the lack of any particular complaint by which to test the superiority, predominance or adequacy of representation of the class. To remedy those problems, the Court of Appeal created a plan for bifurcated trials. But such a plan reaps a host of new and irrefutable difficulties, not the least of which are the deprivation of the Casino's Seventh Amendment rights and the risk of illegitimate, contradictory, and myriad verdicts.

In Amchem, this Court clarified plaintiff's burden of proving that common issues predominate over the individual issues in a Federal Rule of Civil Procedure 23(b)(3) mass tort class action. 117 S.Ct. at 2250-51. In decertifying the Amchem class, this Court noted the following "disparate questions undermining class certification:"

> Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptotic pleural changes, while others suffer from lung cancer, disabling asbestos, or from mesothelioma. . . . Each has a different history of cigarette smoking, a factor that complicates the causation inquiry. . . .

Amchem, 117 S.Ct. at 2250 (citing 83 F.3d 610, 626). These factors were highlighted by the Third Circuit "[i]n contrast to mass torts involving a single accident." Id. It is on these factors that this Court decertified the class.

Amchem thus makes clear that class cohesion in a mass tort setting may be undermined by disparities in exposure, the extent of injuries and other conditions causing or contributing to the complaint. Amchem, 117 S.Ct. at 2250. Despite Amchem, the Court of Appeal found that disparities in various degrees of exposure and disparities among the various complaints of the class representatives were not relevant to the Rule 23 inquiry:

> Here, by contrast [to Amchem], the putative class members are all symptomatic by definition and claim injury from the same defective ventilation system over the same general periods of time.

(App. A, p. 12a).

There is no dispute that this is a class involving exposure to the Casino's ambient air during different shifts and times, at different levels of concentration, among individuals of varying life experiences. There is no dispute that there is no single accident involved in this case. And the variance in class members' life experiences is exponentially important in this case, because the causes of a "respiratory illness" are undisputedly universal -- pollen, dust and smoke exist, in infinitely varying concentrations, in homes, automobiles, shopping malls, schools, neighborhoods and churches, as well as in workplaces. The pollutants are indoors and out, on water and land. Unlike an asbestos product that can be connected to a situs through proof of probable or actual exposure, the Casino does not have a monopoly on pollen, dust or smoke.

Common issues simply cannot predominate in the absence of any single thread (or "medical footprint")

connecting the conduct of the defendant to the injury of the plaintiff: a class of persons who have had a common cold. Therefore, this is precisely the type of class this Court warned against certifying under 23(b)(3) as having predominantly common issues. Amchem. 521 U.S at 615, 117 S.Ct. at 2245-46. In In re Fibreboard, 893 F.2d 706, 712 (5th Cir. 1990) the circuit court reasoned that, in a mass exposure personal injury action:

> There are too many disparities among the various plaintiffs for their common concerns to predominate. The plaintiffs suffer different diseases, some of which are more likely to have been caused by [the product] than others. The plaintiffs were exposed to [the product] in various manners and to varying degrees. The plaintiffs' lifestyles differed in material respects.

Id. at 712. As in Fibreboard, variations of fact in this matter make it clear that common issues do not "predominate over questions affecting only individual members." Id. at 712. Plaintiffs' allegations "raise such individualized questions of law and fact as to overwhelm whatever kernel of common issues might be involved." In re Hotel Tel. Charges, 500 F.2d 86, 88 (9th Cir. 1974); see also, Kline v. Coldwell Banker, 508 F.2d 226, 236 (9th Cir.) cert. denied, 421 U.S. 963 (1974).

B. The Court of Appeal's "superiority" analysis is fatally flawed because the Casino's negligence cannot be determined separately from comparative negligence and proximate cause. Juries will be rendering illegitimate and potentially contradictory verdicts.

The bifurcated trial plan not only violates the Casino's Seventh Amendment rights and the Rules Enabling Act, it jeopardizes the "superiority" requirement of Rule 23(b)(3) by creating substantial risk of inconsistent and invalid verdicts. An examination of the "superiority" requirement of Fed. R. Civ. P. 23(b)(3) "requires an understanding of the relevant claims, defenses, facts, and substantive law presented in the case." Allison v. Citgo Petroleum Corp., 151 F.3d 402, 419 (5th Cir. 1998). Accordingly, as Judge Garza notes in his dissent, it is an abuse of discretion to certify a class action without adequately considering "how a trial on the alleged causes of action would be tried." Castano, 84 F.3d at 752. An examination of how this case might be tried under the Panel opinion's proposed bifurcation reveals that the Phase I and Phase II issues are too intertwined to be considered separately. Certiorari should be granted to prevent Circuit Courts from circumventing Amchem and, simultaneously, using adventuresome bifurcation schemes to reach certification where substantive rights are implicated.

As Judge Garza notes in his dissent, "a defendant is liable for negligence only when the plaintiff's injuries are caused by the same conditions that render the defendant's conduct negligent." (App. A, p. 24a), citing Gavagan v. United States, 955 F.2d 1016, 1020 (5th Cir. 1992). Thus, any determination in Phase II of whether a plaintiff was injured by the same conditions that render the Casino's

conduct negligent necessarily involves reconsideration of the same conditions considered in Phase I. The plaintiffs must therefore do more than point to a common issue (namely, whether there was any defect in the ventilation system at the Casino) to support a Rule 23(b)(3) class.

Thus, the most that a Phase I judgment could accomplish is a finding that the ventilation system could cause injuries in hypothetical circumstances. This is no accomplishment because it does nothing to reduce the issues to be tried in Phase II.[7] In Phase II, the jury would look at each individual class member and decide, in light of the multiple possible exposures unique to that person, whether any problem with the ventilation system was the proximate cause of coughing, having a cold, getting asthma, or any other ailments alleged. Any Phase I determination of negligence in a vacuum would be of no assistance. Even if a ventilation system could cause injuries for some people, this conclusion does not reduce the work that must be done in Phase II to determine whether the conditions at the Casino to which a particular class member was exposed were a proximate cause of his or her damages. As one court explained when rejecting certification of a proposed class of smokers for similar reasons:

> Unless it is proven that cigarettes always cause or never cause addiction, "the resolution of the general causation question accomplishes nothing for any individual plaintiff." . . .

---

[7] Compounding both the Seventh Amendment and the "superiority" problems inherent in this case is the fact that there are likely to be numerous phase-two juries, not one, as apparently contemplated by the Court of Appeal in its consideration of the issues.

> Indeed, the jury would still be required to determine for each class member whether he or she is addicted to cigarettes, and if so, whether defendants (and which defendant) caused that addiction.

Barnes v. The American Tobacco Co., 176 F.R.D. 479, 501 (E.D. Pa. 1997) (citations omitted), aff'd, 161 F.3d 127 (3d Cir. 1998), cert. denied, 119 S.Ct. 1760, 143 L.Ed.2d 791 (1999).

The court cannot determine what risk of injury the Casino unreasonably failed to prevent in the face of varying and seemingly limitless causal agents and complaints. And unless the ventilation system always caused a particular injury, which is not and cannot be alleged, a finding of "general causation" accomplishes nothing to advance the adjudication of common claims. Barnes, 176 F.R.D. at 501.

Judge Garza properly noted in his dissent that if these juries were not to consider the same facts, then there is even a greater risk -- the risk of illegitimate jury verdicts. App. A, p. 24a). As Judge Garza explained, this is because such an approach would not even properly adjudicate the issue of the Casino's negligence. (App. A, p. 26a Ð 27a). The hazards found by the Phase I jury to constitute negligence might not be the same hazards upon which the Phase II juries would determine proximate cause. Id.[8]

---

[8] The extent to which each plaintiff actually knew of the risk of contact with tobacco smoke or other contaminants in a casino and voluntarily confronted that risk is an issue individual to each plaintiff. See, e.g., Nicolas P. Terry, Collapsing Torts, 25 Conn. L. Rev. 717, 732-33 (1993) (and numerous articles cited therein)(defining "assumption of risk" and questioning whether the

The suggestion that a Phase I jury can make a determination of negligence without making a consideration of "those risks or hazards whose likelihood made the conduct unreasonably dangerous" (*i.e.* the alleged causal agent, agents, or multiple combinations of various different agents) does violence to Rule 23 and negligence law.

The determination of whether a plaintiff "unreasonably ran a foreseeable risk of injury" turns upon both the conduct of the defendant and the nature of the precise risk of harm alleged. Harper, Jones & Gray, The Law of Torts (2d ed. 1986.) Vol. 3 ¤ 18.2 at 655. The scope of the Casino's duty, which is likewise necessary to determine negligence, is determined by consideration of injury itself. Gavagan, 955 F.2d at 1020; Harper, supra, at Vol. 3, § 18.2 at 655.

The Panel decision implicitly suggests that the Casino may be held "negligent as a matter of law" or "legally negligent" without regard for the extent to which the various claims as to the "risks or hazards" at issue will render a phase I verdict as to "negligence" futile and invalid. The dissenting opinion (App. A, p. 18a) highlighted the difficulties inherent in attempting to make a determination as to "negligence" without considering the risks or harm alleged, particularly in light of the various claims asserted:

> . . . [I]f the class jury finds the ventilation system negligent because of excessive smoke, a plaintiff should not be able to recover for injuries caused by dust or germs. If it finds the ventilation system negligent solely because

---

doctrine is subsumed by comparative negligence). This factor further complicates both the bifurcation scheme and the superiority finding.

> of high levels of dust or germs, plaintiff should not be able to recover for injuries caused by smoke, temperature, or paint fumes. . . . Put simply, an individual jury might award damages caused by smoke, even though the class jury found Treasure Chest liable only as to excessive dust or germs. This sort of "mix-and-match" verdict simply does not satisfy the elements of negligence, because it would hold Treasure Chest liable for hazards that were never found to constitute a negligent breach of duty.

(App. A, pp. 24a-25a). This is no accomplishment; it is an attempt to find negligence in a vacuum. Barnes v. The American Tobacco Co., 176 F.R.D. at 501.

If the Court of Appeal's decision is allowed to stand, then the federal judiciary, and the Circuit Courts, will have inconsistent precedents as to when class certification is appropriate. This is the very circumstance in which certiorari consideration is most suitable. By using Rule 23 in an adventuresome way to attain certification, the Court of Appeal has violated the Rules Enabling Act by utilizing a procedural rule to abridge and modify the substantive rights of the litigants. 28 U.S.C. § 2072(b). The fiction invoked by the Court that bifurcation cures all ills not only violates substantive rights, it creates precedent which threatens Amchem and Rule 23(b)(3)'s attempted safeguards against undue prejudice.

III. THE JUDGMENT DEFIES THE CLEAR HOLDINGS OF AMCHEM AND ORTIZ WITH REGARD TO THE ADEQUACY OF REPRESENTATION.

Amchem demands vigorous and tenacious commitment to class interests on the part of class representatives and counsel. 521 U.S. at 625-26, 117 S.Ct. at 2250-51. Rule 23(a)(4) requires that a representative's supposed "common interest" be based upon an alignment of interests in disputes of fact and law, and that there be a similar "factual predicate" underlying the claims. National Super Spuds v. New York Mercantile Exchange, 660 F.2d 9, 18-19 & n.7 (2nd Cir. 1981). A class representative must be part of the class and suffer the same injury. Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 159, 102 S.Ct. 2364, 2371 (1982). In this way, Rule 23(a)(4) offers "structural assurance of fair and adequate representation of diverse groups and individuals effected." Amchem, 117 S.Ct. at 2251; In re Joint E.& S. Dist. Asbestos Litigation, 982 F.2d 721, 721-43 (2nd Cir. 1992).

The class representatives in this case attribute their various ailments to different causes. They thus represent a "separate constituency" and adequacy of representation is not met. Amchem, 117 S.Ct. at 2251. Mullen and Bachemin complain of second hand smoke; Phipps complains only of dust on air vents and germs on the employee radios; Mullen also complains about the temperature; Bachemin also complains about paint fumes. The Court of Appeal found these variances irrelevant. (App. A, p. 12a).

The disregard for the various allegations among the representatives presents a square and irreconcilable conflict which, if not addressed by this court, will erode the import of

the holdings in Amchem, 1175 S. Ct at 2251 and Ortiz v. Fibreboard Corp. 119 S.Ct. 2295, 144 L.Ed. 2d 715 (1999).

The claims of the three purported class representatives themselves highlight the lack of adequate representation. Mullen's claim that he suffers an occupational related respiratory illness is inextricably intertwined with his conditions of long term morbid obesity, sleep apnea, depression and anxiety, high blood pressure, degenerative disc disease, asthma, osteoarthritis, "hypersensitivity" to cologne or other fumes, and a history of smoking and drug use.

Sheila Bachemin's medical history is also engrained in her occupational respiratory illness claim. Her history consists of a 20 year smoking career, hay fever, allergies, sinus infections and shortness of breath. Margaret Phipps, on the other hand, has her own history of allergies, hayfever, sensitivity to chemicals and sunlight. Each distinct history will play a pivotal role in any causation or liability determination. The differences in medical histories is but one factor outlining the highly individualized nature of the claims. Because the plaintiffs' experts and treating physicians all testify that hay fever, allergies and other respiratory conditions may come from virtually any source, the plaintiffs' various life experiences, employment histories, hobbies, and genetics will also necessarily affect a liability determination in this action.

Of course, not only are the conditions leading to the claims various and divergent, but the very complaints themselves are dissimilar. Mr. Mullen complains that the vessel was either too hot or too cold for him. Ms. Phipps claims it was dust hanging from the air vents and germs on

employee radios that made her ill. Ms. Bachemin thinks it was the smoke.

Given this broad array of claims and histories, no judgment as to one representative can be binding on any other individual. The nature of the plaintiffs' proposed class thus precludes compliance with Rule 23.

CONCLUSION

The decision of the Court of Appeal violates the United States Constitution, Fed.R.Civ.P. 23(b)(3), and the Rules Enabling Act. The decision creates precedent which, if allowed to stand, will vitiate the fundamental Seventh Amendment right to a trial by jury in cases where factually interwined issues of negligence and comparative negligence are posited for bifurcation before separate juries. This Court should issue a writ of certiorari now to prevent lower courts from denying or abridging this fundamental constitutional right.

Further, if allowed to stand, this decision erodes the predominance and superiority elements of Rule 23(b)(3). As Judge Garza properly recognized, the outcome of this case may create an avenue for future courts to certify actions where predominance of common issues is in question, merely by selecting common issues to be adjudicated in one common trial and by disregarding the myriad and potentially overwhelming individual issues of causation and comparative negligence. The current trial plan created and endorsed by the Court of Appeal will necessarily create a labyrinth of "mix and match verdicts" which will accomplish nothing to advance the resolution of these claims. There can be little doubt that the order, if allowed to stand, will not only cause

this case to disintegrate into a series of individual suits tried separately, it will create a license for future courts to certify cases improperly under Fed.R.Civ.P. 23(b)(3) in similar circumstances. A writ of certiorari should issue now.

Respectfully Submitted,

ADAMS AND REESE LLP
William J. Kelly III
4500 One Shell Square
New Orleans, LA 70139
Telephone: (504) 581-3234
Facsimile: (504) 566-0210

Appeal Counsel for Petitioner,
TREASURE CHEST CASINO, L.L.C.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed August 19, 1999]

No. 97-31189

DENNIS MULLEN,
Plaintiff- Appellee,

v.

TREASURE CHEST CASINO, LLC; ET AL,
Defendants,

TREASURE CHEST CASINO, LLC,
Defendant - Appellant.

DENNIS MULLEN;
SHEILA BACHEMIN;
MARGARET PHIPPS,
Plaintiffs - Appellees,

v.

TREASURE CHEST CASINO, LLC; ET AL,
Defendants,

TREASURE CHEST CASINO, LLC,
Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

Before EMILIO M. GARZA, BENAVIDES, and DENNIS, Circuit Judges.

BENAVIDES, Circuit Judge:

Treasure Chest Casino, LLC ("Treasure Chest") appeals from an interlocutory order of the district court certifying under Federal Rule of Civil Procedure 23(b)(3) a plaintiff class consisting of injured Treasure Chest employees. We affirm the district court's class certification.

I. BACKGROUND

The appellees, Dennis Mullen, Sheila Bachemin, and Margaret Phipps (collectively, the "Named Plaintiffs"), are former employees of the M/V Treasure Chest Casino (the "Casino"), a floating casino owned and operated out of Kenner, Louisiana by appellant Treasure Chest. Mullen was an assistant pit boss, Bachemin was a dealer, and Phipps was employed as a slot-floor person and dealer.

Each Named Plaintiff has suffered respiratory illness allegedly caused by the Casino's defective and/or improperly maintained air-conditioning and ventilating system. Each was diagnosed with asthma and bronchitis while employed aboard

the Casino. Mullen and Bachemin, while aboard the Casino, suffered respiratory attacks requiring hospitalization. Kathleen McNamara, the Named Plaintiffs' physician, testified in a deposition that as many as half of the 300 Casino employees that she had treated suffered from similar respiratory problems. She attributed the Named Plaintiffs' and other crew members' maladies to extremely smoky conditions in the Casino.

In January 1996, the Named Plaintiffs filed suit against Treasure Chest, making Jones Act, unseaworthiness, and maintenance and cure claims. They sought Rule 23 certification of a class consisting of

> all members of the crew of the M/V Treasure Chest Casino who have been stricken with occupational respiratory illness caused by or exacerbated by the defective ventilation system in place aboard the vessel.

The parties conducted pre-certification discovery that included deposing the Named Plaintiffs, Dr. McNamara, and two other physicians. The parties then briefed the district court, which heard arguments in July 1997.

On August 29, 1997, the district court certified the proposed class under Rule 23(b)(3). Under the court's plan, the liability issues common to all class members will be tried together in an initial trial phase. Those common issues include whether the employees of the Casino are seamen within the meaning of the Jones Act, whether the Casino is a vessel within the meaning of the Jones Act, whether the Casino was rendered unseaworthy by the air quality aboard,

and whether Treasure Chest was negligent in relation to the Casino's ventilation system. If the class prevails on the common liability issues in phase one, the issues affecting only individual class members will be tried in a second phase in waves of approximately five class members at a time. These limited issues include causation, damages, and comparative negligence.

Treasure Chest sought to appeal the class certification order, and the district court certified the issue for interlocutory appeal under 28 U.S.C. § 1292 (b) . We granted
Treasure Chest permission to appeal.

II. DISCUSSION

A class may be certified under Rule 23(b)(3) only if it meets the four prerequisites found in Rule 23(a) and the two additional requirements found in Rule 23(b)(3). The four 23(a) prerequisites include

> (1) numerosity (a class so large that joinder of all members is impracticable); (2) commonality (questions of law or fact common to the class); (3) typicality (named parties' claims or defenses are typical of the class); and (4) adequacy of representation (representatives will fairly and adequately protect the interests of the class).

Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231, 2245 (1997). The two 23(b) requirements are "predominance" and "superiority": "Common questions must 'predominate over

any questions affecting only individual members'; and class resolution must be 'superior to other available methods for the fair and efficient adjudication of the controversy.'" *Id.* at 2246 (quoting Fed. R. Civ. P. 23(b) (3)).

Treasure Chest argues on appeal that the district court erred in finding any of the Rule 23 requirements satisfied.[1] Before evaluating the six requirements seriatim, we note that the district court maintains great discretion in certifying and managing a class action. *See Montelongo v. Meese,* 803 F.2d

---

[1] Treasure Chest also argues on appeal that implicit in Rule 23 is an additional requirement that any class must be capable of objective identification before it can be certified. It contends that because being a member of the class in this case is contingent upon ultimate issues of causation, i.e., whether the class member's illness was "caused or exacerbated by the defective ventilation system," Treasure Chest is prejudiced by being forced to defend against claimants who may not end up being members of the class. This same argument was already rejected by this Court in *Forbush v. J.C. Penney Co.,* 994 F.2d 1101 (5th Cir. 1993). There, we considered a defendant's contention that a class of pension beneficiaries was "hopelessly 'circular'" because membership in the class was defined by the improper reduction of the class members' benefits, which was also the ultimate issue in the case. *Id* at 1105. We found that the defendant's argument was "meritless and, if accepted, would preclude certification of just about any class of persons alleging injury from a particular action. These persons are linked by this common complaint, and the possibility that some may fail to prevail on their individual claims will not defeat class membership." *Id.* Here, because the class is similarly linked by a common complaint, the fact that the class is defined with reference to an ultimate issue of causation does not prevent certification.

1341, 1351 (5th Cir. 1986). We will reverse a district court's decision to certify a class only upon a showing that the court abused its discretion, *see Jenkins v. Raymark Industries,* 782 F.2d 468, 471-72 (5th Cir. 1986), or that it applied incorrect legal standards in reaching its decision, *see Forbush v. J.C. Penney Co.,* 994 F.2d 1101, 1104-05 (5th Cir. 1993).

A. Numerosity

The court found that "the class is so numerous that joinder of all members is impracticable," Fed. R. Civ. P. 23(a) (1), referring to three factors. First, the class would likely consist of between 100 and 150 members. Second, owing to the transient nature of employment in the gambling business, it was likely that some of the putative class members were geographically dispersed and unavailable for joinder. Third, putative class members still employed by the Casino might be reluctant to file individually for fear of workplace retaliation. Treasure Chest challenges only the second of the district court's three reasons. It asserts that the district court's claim that class members would be geographically dispersed was unsupported by evidence. They reference the court's own comment that the "plaintiff has not introduced any specific evidence that there are potential class members that have moved out of the area."

We find no abuse of discretion in the district court's finding of numerosity. Although the number of members in a proposed class is not determinative of whether joinder is impracticable, *see Zeidman v. J. Ray McDermott & Co.,* 651 F.2d 1030, 1038 (5th Cir. 1981), the size of the class in this case--100 to 150 members--is within the range that generally satisfies the numerosity requirement. *See* 1 Newberg on

Class Actions § 3.05, at 3-25 (3d ed. 1992) (suggesting that any class consisting of more than forty members "should raise a presumption that joinder is impracticable"); *cf. Boykin v. Georgia-Pacific Corp.*, 706 F.2d 1384, 1386 (5th Cir. 1983) (finding that numerosity requirement would not be met by a class with 20 members but was met by a class with 317 members).

Furthermore, the additional factors mentioned by the district court support its finding of numerosity. *See Zeidman*, 651 F.2d at 1038 (discussing relevant factors including, for example, "the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff's claim"). Notwithstanding the lack of any direct evidence, the district court reasonably inferred from the nature of the putative class members' employment that some of them would be geographically dispersed. It also reasonably presumed that those potential class members still employed by Treasure Chest might be unwilling to sue individually or join a suit for fear of retaliation at their jobs. Based upon those considerations, it was within the district court's discretion to find that joinder of all 100 to 150 class members would be impracticable.

B. Commonality

The district court found that "there are questions of law or fact common to the class," Fed. R. Civ. P. 23(a) (2), on the basis of the class members' identical theories of liability, their common claims under the Jones Act, and their uniform allegations of suffering injury from second-hand smoke. Treasure Chest challenges the district court's

assertion that all plaintiffs' claims relate to second-hand smoke.

The district court did not abuse its discretion in finding commonality. The test for commonality is not demanding and is met "where there is at least one issue, the resolution of which will affect all or a significant number of the putative class members." *Lightbourn v. County of El Paso,* 118 F.3d 421, 426 (5th Cir. 1997). In this case, the putative class members will assert claims for negligence under the Jones Act and for operating an unseaworthy vessel. The common issues pertaining to these theories of liability--i.e., the class members' status as Jones Act seamen, the negligence of Treasure Chest, and the unseaworthiness of the Casino--are independently sufficient to establish commonality. It is therefore irrelevant whether the class members uniformly allege damages from second-hand smoke.

C. Typicality

The district found the "the claims or defenses of the parties are typical of the claims or defenses of the class," Fed. R. Civ. P. 23(a) (3), because the Named Plaintiffs and the class members, by definition, all allege to have suffered occupation-related respiratory illness. Treasure Chest contends that the Named Plaintiffs' claims are not typical of the class because a wide array of claims could fall under the "respiratory illness" category.

We find no abuse in the district court's finding of typicality. Like commonality, the test for typicality is not demanding. It "focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those

whom they purport to represent.'" *Lightbourn,* 118 F.3d at 426. In this case, the Named Plaintiffs' and the proposed class members' legal and remedial theories appear to be exactly the same. The class complaint indicates that they will all premise liability for the Casino's defective air ventilation system under the Jones Act and the doctrine of seaworthiness. Any variety in the illnesses the Named Plaintiffs and the class members suffered will not affect their legal or remedial theories, and thus does not defeat typicality.

D. Adequacy of Representation

The district court stated that "the representative parties will fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a) (4), because the Named Plaintiffs' interests are identical to the interests of the proposed class and their attorneys have extensive experience litigating class actions and Jones Act cases. Treasure Chest argues on the appeal that the district court's finding was erroneous because the Named Plaintiffs and the class members have suffered from varied illnesses and have varying susceptibilities to respiratory ailments.

We find no abuse of discretion in the district court's finding. Differences between named plaintiffs and class members render the named plaintiffs inadequate representatives only if those differences create conflicts between the named plaintiffs' interests and the class members' interests. *See Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 472 (5th Cir. 1986) (considering whether named plaintiffs have "an insufficient stake in the outcome or interests antagonistic to the unnamed members" in evaluating adequate representation requirement). The differences

described by Treasure Chest may create variances in the ways that the Named Plaintiffs and class members will prove causation and damages. A class member who has never smoked, for example, may have less difficulty in proving that the conditions inside the Casino caused her asthma than will Bachemin, who has a history of smoking and whose claim may be subject to a defense of contributory negligence. Such a difference, however, does not affect the alignment of their interests. Nothing indicates that the class members will be inadequately represented by the Named Plaintiffs and their counsel.

E. Predominance

We see no abuse in the district court's finding that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b) (3). "In order to 'predominate,' common issues must constitute a significant part of the individual cases." *Jenkins*, 782 F.2d at 472. The district court held that the issues to be tried commonly--seamen status, vessel status, negligence, and seaworthiness--were significant in relation to the individual issues of causation, damages, and contributory negligence. Treasure Chest argues on appeal that the district court abused its discretion by failing to weigh the common against the individual issues and by improperly finding causation to be a common issue.

Treasure Chest's arguments are without merit. First, although the court's predominance inquiry was not lengthy, there is no indication that the court limited its inquiry to counting issues instead of weighing them. Second, explicit in

the district court's decision is a finding that causation is a unique issue that will be resolved in the trial plan's second-phase individual trials.

Even examining the district court's predominance analysis more closely, we find no abuse. The common issues in this case, especially negligence and seaworthiness, are not only significant but also pivotal. They will undoubtedly require the parties to produce extensive evidence regarding the Casino's air ventilation system, as well as testimony concerning Treasure Chest's knowledge of, and response to, the Casino employees' respiratory problems and complaints. The phase-one jury will have the difficult task of determining whether the air quality aboard the Casino resulted from a negligent breach of Treasure Chest's duty to its employees or rendered the Casino unseaworthy. If Treasure Chest prevails on those two issues alone, they will prevail in the case.

Moreover, this case does not involve the type of individuated issues that have in the past led courts to find predominance lacking. For example, in *Amchem Products, Inc. v. Windsor,* 117 S. Ct. 2231 (1997), the Supreme Court found that common issues did not predominate where the members of the plaintiff class were exposed to asbestos-containing products from different sources over different time periods, some of the class members were asymptomatic while others had developed illnesses, and the class members were from a variety of states requiring the application of a multitude of different legal standards. *See id.* at 2250 (citing *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 626 (3d Cir. 1996)). Similarly, in *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), this Court found that a putative class of addicted smokers did not meet the predominance

requirement because there were complex choice-of-law issues and the case involved novel addiction-as-injury claims with no track record from which a court could determine which issues were "significant." *See id.* at 741-45. Here, by contrast, the putative class members are all symptomatic by definition and claim injury from the same defective ventilation system over the same general period of time. Because all of the claims are under federal law, there are no individual choice-of-law issues. And, because negligence and doctrine-of-sea-worthiness claims are time-tested bases for liability, the district court could reasonably evaluate the significance of the common issues without first establishing a track record.

F. Superiority

We also find no abuse of discretion in the district court's finding that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b) (3). The district court based its superiority finding on the fact that the class litigation in this case would not present the degree of managerial complexities that prompted this Court to decertify the putative class in *Castano*. Specifically, the district court mentioned the lack of any complex choice-of-law or *Erie* problems, and that the class would consist of only hundreds, instead of millions, of members. The bifurcated-trial plan, the court found, would "promote judicial economy and avoid the wasteful, duplicative litigation which would inevitably result if these cases were tried individually." Treasure Chest argues that the district court abused its discretion by failing adequately to consider how a trial on the merits would be conducted. It contends that because the Named Plaintiffs describe somewhat different causes for their ailments, a

phase-one judgment of negligence or unseaworthiness related solely to tobacco smoke would be inadequate insofar as it would preclude plaintiffs from recovering for ailments that were caused by sources other than tobacco smoke in the phase-two trials.

We find no merit in Treasure Chest's argument. First, Treasure Chest overstates the importance of the Named Plaintiffs' conjecture regarding their own illnesses. It is true that, in addition to making second-hand smoke complaints, Dennis Mullen has complained about the temperature aboard the Casino, Sheila Bachemin has described one incident where paint fumes on the Casino "kicked in" her asthma, and Margaret Phipps has stated that her asthma might have been caused by dust on the air vents or germs on the radios used by multiple casino employees. As lay witnesses, however, the Named Plaintiffs' opinions about the possible causes of their own respiratory conditions are of negligible evidentiary weight and probably would not be admissible at trial. *See* Fed. R. Evid. 701 (limiting admissibility of nonexpert opinion testimony); *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 460 (5th Cir. 1996) ("[A] person may testify as a lay witness only if his opinions or inferences do not require any specialized knowledge and could be reached by any ordinary person."); *Henry v. A/S Ocean*, 512 F.2d 401, 408 (2d Cir. 1975) (finding that the plaintiff in a Jones Act suit was properly prevented from testifying to his opinion that his persistent colds and skin rash had been caused by an accident in which he was knocked overboard). The medical experts already deposed in this case have unwaveringly cited excessive secondhand smoke as the most likely Casino-related factor to have exacerbated or caused the putative class members' respiratory problems. It is thus likely that the trial will focus

on excessive second-hand smoke as both the effect of the defective ventilation system and the cause of the putative class members' respiratory problems.

Furthermore, even if the class does claim at trial that the Casino's ventilation system was defective in relation to more than tobacco smoke, we are confident that the district court can ably manage this case as a class action. Our precedent limits a negligent party's liability to injuries that are caused by the same condition that rendered the party negligent. *See Gavagan v. United States,* 955 F.2d 1016, 1020-21 (5th Cir. 1992). The court can easily abide by this precedent by instructing the jury to answer special verdicts finding whether the Treasure Chest was negligent, or the Casino was unseaworthy, as to each alleged causal agent, i.e., tobacco smoke, dust mites, fungi, paint fumes, et cetera. The court can then properly limit the injuries for which the phase-two juries could find Treasure Chest liable. Thus, if the phase-one jury were to find that Treasure Chest was negligent as to tobacco smoke but not as to paint fumes, any class member whose injuries were found by a phase-two jury to be caused by paint fumes would be unable to recover. Even though rendering multiple special verdicts would complicate the task for the phase-one jury and the court, we would see no abuse in the district court's finding such a process superior to conducting duplicative individual trials.

We also agree with the district court that none of the superiority concerns raised by our decision in *Castano* requires a different result. There, many of the manageability problems stemmed from the million-person class membership, the complex choice-of-law issues, the novel addiction-as-injury cause of action, and the extensive subclassing

requirements. As already discussed, none of those problems exist in this case. In fact, unlike the "Frankenstein's monster" feared in *Castano,* 84 F.3d at 745 n.19, this class is akin to other bifurcated class actions this Court has approved. *See Watson v. Shell Oil Co.,* 979 F.2d 1014 (5th Cir. 1992) (finding no abuse in the district court's certification of a bifurcated class action arising from an oil refinery explosion where liability and punitive damages would be resolved commonly and injury, causation, and actual damages would be resolved individually); *Jenkins,* 782 F.2d 468 (finding no abuse of discretion in district court's certification of a bifurcated class action where asbestos producers' "state of the art defense" as well as product identification, product defectiveness, negligence, and punitive damages would be resolved commonly and causation, actual damages, and comparative fault would tried individually); *Hernandez v. Motor Vessel Skyward,* 61 F.R.D. 558 (S.D. Fla. 1973), *aff'd,* 507 F.2d 1278-79 (5th Cir. 1975) (unpublished) (certifying bifurcated class action on behalf of 350 passengers who were fed contaminated food aboard cruise ship where negligence would be tried commonly and causation and damages would be tried individually).

In *Castano,* this Court expressed a concern that having one jury consider the defendant's conduct and another consider the plaintiffs' comparative negligence could create Seventh Amendment problems. *See Castano,* 84 F.3d at 750-51 (citing *In re Rhone-Poulenc Rorer Inc.,* 51 F.3d 1293, 1303 (7th Cir. 1995)). This does not change our view of the district court's superiority finding. Treasure Chest did not raise this issue to the district court nor has it been argued on appeal. We are reluctant to find that the district abused its

discretion by failing to consider an issue that was not raised by the parties.

In any case, we would not find the risk of infringing upon the parties' Seventh Amendment rights significant in this case. The Seventh Amendment does not prohibit bifurcation of trials as long as the "'the judge [does] not divide issues between separate trials in such a way that the same issue is reexamined by different juries.'" *Cimino v. Raymark Industries, Inc.*, 151 F.3d 297, 320 n.50 (5th Cir. 1998) (quoting *Rhone-Poulenc*, 51 F.3d at 1303); *see Alabama v. Blue Bird Body Co., Inc.*, 573 F.2d 309, 318 (5th Cir. 1978). In *Castano*, we were concerned that allowing a second jury to consider the plaintiffs' comparative negligence would invite that jury to reconsider the first jury's findings concerning the defendants' conduct. We believe that such a risk has been avoided here by leaving all issues of causation for the phase-two jury. When a jury considers the comparative negligence of a plaintiff, "the focus is upon causation. It is inevitable that a comparison of the conduct of plaintiffs and defendants ultimately be in terms of causation." *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1431 (5th Cir. 1983) (en banc); *see id.* (permitting the use of comparative negligence in strict liability claims). Thus, in considering comparative negligence, the phase-two jury would not be reconsidering the first jury's findings of whether Treasure Chest's conduct was negligent or the Casino unseaworthy, but only the degree to which those conditions were the sole or contributing cause of the class member's injury. Because the first jury will not be considering any issues of causation, no Seventh Amendment implications affect our review of the district court's superiority finding.

III. CONCLUSION

For the foregoing reasons, we find that the district court did not abuse its discretion in certifying under Rule 23(b) (3) a class of all Casino employees stricken with occupation-related respiratory illnesses. AFFIRMED.

EMILIO M. GARZA, dissenting:

Treasure Chest Casino, L.L.C. ("Treasure Chest") appeals the district court's order granting class certification under Federal Rule of Civil Procedure 23(b)(3). The majority affirms, finding that the district court did not abuse its discretion in concluding that the plaintiffs' class satisfies the requirements of Rule 23. I respectfully dissent.

I

Plaintiffs Dennis Mullen, Sheila Bachemin, and Margaret Phipps are crew members of the M/V Treasure Chest Casino ("Casino"), a vessel owned and operated by Treasure Chest in Kenner, Louisiana. They allege that they suffered respiratory illnesses as a result of inadequate ventilation aboard the vessel. According to the district court, the plaintiffs attribute their illnesses to second-hand smoke aboard the Casino. However, the record indicates that the plaintiffs ailege other causes as well. In her deposition, Phipps complains of dust on the air vents and germs on the employee radios, and does not attribute her illness to second-hand smoke. Mullen, who does complain of excessive smoke aboard the Casino, also states in his deposition that his illness may have stemmed from the Casino's temperature being too hot or too cold. Bachemin complains of second-hand smoke, but she testifies about excessive paint fumes as well.

These plaintiffs sued Treasure Chest, on behalf of themselves and persons similarly situated, for negligence under the Jones Act, 46 U.S.C. § 688, for operating an unseaworthy vessel, and for failing to provide Maintenance and Cure. They moved to certify a class action under Rule

23(b)(3).[1] The district court certified a class consisting of "all members of the crew of the M/V Treasure Chest Casino who have been stricken with occupational respiratory illness caused by or exacerbated by the defective ventilation system in place aboard the vessel." Treasure Chest now appeals.

II

Federal Rule of Civil Procedure 23(a) sets forth four prerequisites for all class actions:

> (1) numerosity (a class so large that joinder of all members is impracticable); (2) commonality (questions of law or fact common to the class); (3) typicality (named parties' claims or defenses are typical of the class); and (4) adequacy of representation (representatives will fairly and adequately protect the interests of the class).

Amchem Prods. v. Windsor, 521 U.S. 591, 613, 117 S. Ct. 2231, 2245, 138 L. Ed. 2d 689 (1997) (quotation marks omitted). Once the criteria of Rule 23(a) are met, a party must show that class treatment is appropriate under one of the three categories enumerated in Rule 23(b). *See id.* at 614, 117 S. Ct. at 2245. Rule 23(b)(3), under which this class was certified, demands "that the questions of law or fact common

---

[1] The plaintiffs also requested that the district court certify a class under Rule 23(b)(1). The district court declined to address Rule 23(b)(1), on the grounds that the plaintiffs raised it for the first time their reply brief. On appeal, the plaintiff's do not raise Rule 23(b)(1) as a basis for class certification.

to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3). These requirements are commonly referred to as predominance and superiority. *See Amchern,* 521 U.S. at 615, 117 S. Ct. at 2246. Rule 23(b)(3) applies to cases for which "a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Id.* (quotations omitted).

The district court concluded that the plaintiffs' class satisfied Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy of representation. It also found that common issues of law and fact predominated over individual issues. The district court identified as common issues (1) whether Casino employees are seamen within the meaning of the Jones Act, (2) whether the Casino is a vessel within the meaning of the Jones Act, (3) whether the Casino was unseaworthy, and (4) whether the Casino's ventilation system was unreasonably suited to protect the class members from harm. It classified contributory negligence, damages, and causation as individual issues. Finally, the district court ruled that a class action was superior to other available methods of adjudicating the proposed class members' claims. In doing so, the district court relied on the plaintiffs' proposed trial plan, which provided: "The class action would include an initial phase in which the liability issues common to all plaintiffs would be tried together. Later if plaintiffs prevailed on liability, the unique issues such as damages (and causation if necessary), would be tried in waves

of approximately five plaintiffs at a time." The district court reasoned that "this approach will promote judicial economy and avoid the wasteful, duplicative litigation which would inevitably result if these cases were tried individually."

III

A district court "has wide discretion in deciding whether to certify a proposed class." *Lightbourn v. County of El Paso,* 118 F.3d 421, 425 (5th Cir. 1997). We may reverse its decision only for abuse of discretion. *See id.* Treasure Chest contends that the district court abused its discretion in finding that the proposed class satisfied Rule 23. According to Treasure Chest, the plaintiffs' class lacks numerosity, commonality, typicality, and adequacy of representation, and fails to satisfy Rule 23(b)(3)'s predominance and superiority requirements. The majority examines these six requirements and concludes that the district court did not abuse its discretion. Under the law of our circuit, however, the district court abused its discretion in finding that a class action was "superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3).[2]

A court's inquiry into superiority "requires an understanding of the relevant claims, defenses, facts, and substantive law presented in the case." *Allison v. Citgo*

---

[2] Because I believe that the plaintiffs' class fails the superiority requirement of Rule 23(b)(3), I would not reach the other issues addressed in the majority's opinion, *i.e.*, numerosity, commonality, typicality, adequacy of representation, and predominance.

Petroleum Corp., 151 F.3d 402, 419 (5th Cir. 1998); *see also* FED. R. CIV. P. 23(b)(3) (requiring that in assessing whether class treatment is superior, a court must consider "the difficulties likely to be encountered in the management of a class action"). It is an abuse of discretion to certify a class without adequately considering "how a trial on the alleged causes of action would be tried." *Castano v. American Tobacco Co.*, 84 F.3d 734, 751 (5th Cir. 1996); *cf. Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 552 F.2d 601, 603 (5th Cir. 1977) ("The district court's failure to consider the appropriate factors constitutes an abuse of discretion.").

The district court certified a class of all Casino employees who were "stricken with occupational respiratory illness caused by or exacerbated by the defective ventilation system." To prevail, these plaintiffs must prove both negligent breach of duty and proximate cause. *See Gavagan v. United States*, 955 F.2d 1016, 1019 n.6 (5th Cir. 1992). Under the trial plan, the issue of "whether the ventilation system of the M/V Treasure Chest Casino was unreasonably suited to protect the proposed class members from harm" will be tried as a common issue to a class jury. However, the issue of proximate cause will be tried as an individual issue to individual juries.

In upholding the district court's bifurcated approach to these two issues, the majority relies on three cases, in which we allowed a district court to try the issue of negligence separately from the issue of proximate cause. *See Watson v.*

Shell Oil Co., 979 F.2d 1014 (5th Cir. 1992);[3] *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir. 1986); *Hernandez v. Motor Vessel Skyward*, 507 F.2d 1278 (5th Cir. 1975) (unpublished). In general, of course, district courts have the authority to bifurcate a trial, trying some issues on a class basis and others individually. *See* FED. R. CIV. P. 23(c)(4)(A) (authorizing class treatment with respect to particular issues); FED. R. CIV. P. 42(b) (authorizing separate trials for separate issues). However, in all of the cases cited by the majority, the class members' injuries stemmed from a single hazard. In the instant case, the class members attribute their various ailments to different aspects of the air aboard the Casino. Mullen and Bachemin complain of second-hand smoke, whereas Phipps complains only of dust on air vents and germs on employee radios. Mullen, additionally, points to the Casino's temperature. Bachemin complains of paint fumes.

The district court abused its discretion by failing to consider the difficulties posed by the plaintiffs' divers allegations.[4] In a negligence case, a defendant owes a duty

---

[3] Our opinion in *Watson* is no longer binding precedent on our circuit. As we have explained: "While *[Watson]* was awaiting rehearing en banc, it settled. According to the Internal Operating Procedure accompanying 5TH CIR. R. 35, the effect of granting a rehearing en banc is to vacate the previous opinion and judgment of the Court and to stay the mandate." *Castano*, 84 F.3d at 740 n.12 (quotation marks and citations omitted); *see Watson v. Shell Oil Co.*, 53 F.3d 663, 664 (5th Cir. 1994) (en banc).

[4] The plaintiffs suggest in a footnote that we should "disregard" the fact that the disparate sources of illness they allege

"only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous." *Gavagan*, 955 F.2d at 1020 (emphasis omitted) (quoting 3 HARPER, JAMES & GRAY § 18.2, at 655). In other words, a defendant is liable for negligence only when the plaintiff's injuries are caused by the same conditions that render the defendant's conduct negligent. This principle is important to consider, because in this case, different plaintiffs allege different "risks or hazards." *Id.* For example, if the class jury finds the ventilation system negligent because of excessive smoke, a plaintiff should not be able to recover for injuries caused by dust or germs. If it finds the ventilation system negligent solely because of high levels of dust or germs, plaintiffs should not be able to recover for injuries caused by smoke, temperature, or paint fumes.

The district court's trial plan fails to account for the fact that the plaintiffs allege a variety of different "risks or hazards." There is nothing in the trial plan to ensure that the hazards found by the class jury to constitute negligence are the same hazards based on which the individual juries would

---

(*e.g.*, smoke, temperature, germs, dust, fumes) might preclude class certification. They argue that a magistrate judge's ruling prevented them from discovering the precise nature of the defects in the ventilation system. The magistrate's discovery ruling is not before us on appeal. Even if it could be shown that discovery was insufficient, it does not follow that we must approve a class that fails to meet the requirements of Rule 23. Rather, we must decertify such a class, even if further discovery may eventually justify class treatment. *See Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 323 (5th Cir. 1978) (decertifying class where discovery was insufficient to determine whether common issues existed).

determine proximate cause. Put simply, an individual jury might award damages caused by smoke, even though the class jury found Treasure Chest liable only as to excessive dust or germs. This sort of "mix-and-match" verdict simply does not satisfy the elements of negligence, because it would hold Treasure Chest liable for hazards that were never found to constitute a negligent breach of duty. The district court failed to consider the potential for its bifurcated approach to yield such illegitimate verdicts.[5]

Of course, the risk of unjustified verdicts could be avoided if the individual juries determined for themselves whether a given plaintiffs' injuries were caused by "those risks or hazards whose likelihood made the conduct unreasonably dangerous." *Id.* To do so, however, the individual juries would be required to make essentially the same inquiry made by the class jury, that is, whether the hazards posed by the Casino's ventilation system unreasonably failed to protect the plaintiffs from harm. This overlap between the issues decided by the class jury and the individual juries impacts a court's superiority inquiry for two reasons. First, it may eviscerate one of the primary rationales for class treatment--judicial efficiency. *See Castano,* 84 F.3d at 749. Where the class jury and the individual juries must consider similar issues, it is likely that evidence presented at the class trial will be repeated during the individual trials.

---

[5] The majority suggests that the district court can avert this problem by instructing the class jury to answer special verdicts as to each hazard alleged by the plaintiffs. However, such special verdicts are not included in the district court's trial plan.

See id. As we have noted, "[t]he net result may be a waste, not a savings, in judicial resources." *Id.*

Second, having separate juries consider essentially the same issue may run afoul of the Seventh Amendment. "[I]nherent in the Seventh Amendment guarantee of a trial by jury is the general right of a litigant to have only one jury pass on a common issue of fact." *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978); *see* U.S. CONST. amend. VII ("no fact tried by a jury shall be otherwise reexamined in any Court of the United States"). Therefore, a court may try a certain issue to a different jury only when that issue is "distinct and separable from the others." *Blue Bird Body*, 573 F.2d at 318. "Such a rule is dictated for the very practical reason that if separate juries are allowed to pass on issues involving overlapping legal and factual questions the verdicts rendered by each jury could be inconsistent." *Id.* When the bifurcation of class and individual issues risks improper reconsideration of issues assigned to the class-wide jury, appellate courts have not hesitated to decertify the class. *See Castano*, 84 F.3d at 751; *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1302-03 (7th Cir. 1995).

These same concerns--judicial efficiency and the Seventh Amendment--are also implicated by the district court's plan to handle the issue of comparative negligence. Under the trial plan, comparative negligence will be considered by the individual juries, whereas the Casino's negligence will be considered by the class jury. These two issues are too closely related to allow bifurcated treatment. "Comparative negligence, by definition, requires a comparison between the defendant's and the plaintiff's conduct." *Castano*, 84 F.3d at 751; *see also Rhone-Poulenc*,

51 F.3d at 1303. Therefore, to properly try the issue of comparative negligence, the parties may need to repeat evidence concerning the Casino's conduct that was already presented to the class jury. *See Castano,* 84 F.3d at 751. Furthermore, in comparing the negligent conduct of the Casino with the negligent conduct of each plaintiff, the individual juries may "impermissibly reconsider[]" the class jury's determination as to the Casino's negligence, in violation of the Seventh Amendment. *Id.; see also Rhone-Poulenc,* 51 F.3d at 1303. Accordingly, "class treatment can hardly be said to be superior to individual adjudication." *Castano,* 84 F.3d at 751 (finding that a bifurcated class action failed Rule 23(b)(3)'s superiority requirement where the district court planned to try the issues of negligence and comparative negligence to separate juries).

IV

The district court in this case failed to consider "the difficulties likely to be encountered in the management of a class action." FED. R. CIV. P. 23(b)(3). Specifically, it did not address how the disparate hazards alleged by each plaintiff impact whether bifurcated class treatment is feasible. This failure to adequately examine "how a trial on the alleged causes of action would be tried" constitutes an abuse of discretion and requires that we vacate the class certification order. *Castano,* 84 F.3d at 752. Accordingly, I dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[Filed August 29, 1997]

No. 96-0052

DENNIS MULLEN, ET AL.
Plaintiff,

v.

TREASURE CHEST CASINO, L.L.C. & BOYD GAMING CORPORATION,
Defendant.

ORDER AND REASONS
Entered: September 2, 1997

Considering the memoranda and arguments of counsel and the applicable law, IT IS ORDERED that plaintiffs' Motion to Certify Class Action be and hereby is GRANTED for the following reasons.

I. BACKGROUND

Plaintiffs Dennis Mullen, an Assistant Pitt Boss, Sheila

Bachemin, a Dealer, and Margaret Phipps, a Slot-Floor Person and Dealer, filed a complaint against Treasure Chest Casino, L.L.C. ("Treasure Chest"), and Boyd Gaming Corporation ("Boyd"), on behalf of themselves and persons similarly situated, alleging that they suffer from illnesses caused by and/or exacerbated by their exposure to second-hand smoke while employed by the defendants. Defendants operate a vessel used as a casino. Plaintiffs claim that the gamblers who use defendants' casino are incessant smokers and that the ventilation system of the defendant's vessel is inadequate.[1] Plaintiffs claim that defendants are liable to them for negligence under the Jones Act, 48 U.S.C. § 688, for operating an unseaworthy vessel, and for failing to provide Maintenance and Cure to the plaintiffs.

II. MOTION TO CERTIFY CLASS ACTION

Plaintiffs filed a Motion to Certify Class Action, in which plaintiffs seek to certify a class consisting of:

> all members of the crew of the M/V Treasure Chest Casino who have been stricken with occupational respiratory illness caused by or exacerbated by the defective ventilation system in place aboard the vessel.

Certification of a case as a class action is governed by Rule 23 of the Federal Rules of Civil Procedure, which provides:

---

[1] Plaintiffs contend that encapsulation psychologically induces gambling, thus suggesting that to some extent the exposure is deliberate.

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if

(1) the class is so numerous that joinder of all members is impraticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole, or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest, of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) the difficulties likely to be encountered in the management of a class action.

A. RULE 23(a)

1. NUMEROSITY

Plaintiffs argue that joinder of all of the potential parties to this suit would be impracticable. In considering whether the requirements of Rule 23(a)(1) are met, courts consider the practicability of joinder in light of the particular circumstances before it. Generally, courts look to the number of the potential claimants, their geographic disparity, their financial ability to bring individual suits and the potential fear

of retaliation for their bringing individual suits. *See* 1 NEWBERG ON CLASS ACTIONS §3.06 (3rd ed. 1992).

(a) Number

Plaintiffs claim that the potential number of the proposed class is approximately 200 persons. Plaintiffs base this estimate on the testimony of Dr. Kate McNamara, who treated employees of the M/V Treasure Chest Casino through their health insurance policies which were provided by the vessel as part of their employment. Dr. McNamara indicates that she has treated approximately 100 to 150 of the defendants' employees for upper respiratory sinusitis and bronchitis and exacerbated asthma conditions related to inhalation of second-hand smoke. *See* Deposition of Dr. McNamara at p.143-44.

There is no particular number of potential claimants which makes joinder impracticable for purposes of Rule 23(a)(1). Courts have certified classes of as few as 15 plaintiffs[2] and have denied class certification for as many as 300 plaintiffs.[3] The number of potential claimants is only relevant to the extent that it indicates that joinder would be impracticable. However, a sufficiently large number of potential claimants alone may indicate that the numerosity requirement is met. *See* 1 NEWBERG ON CLASS ACTIONS

---

[2] *See Manning v. Princeton Consumer Discount Company, Inc.*, 390 F. Supp. 320, 324 (E.D.Pa. 1975), *aff'd*, 533 F.2d 102 (3rd Cir. 1976).

[3] *See Minersville. Coal Co. v. Anthracite Export Ass'n*, 55 F.R.D. 426, 428 (M.D.Pa. 1971).

§3.05, at 3-25 (3rd ed. 1992). Plaintiffs have presented evidence that the number of potential claimants in this case will be between 100 to 150 persons.

(b) Geographic Disparity

Plaintiffs claim that many of the potential class members may have moved due to the transient nature of employment in the gambling business. The fact that potential claimants may be geographically dispersed or difficult to track indicates that it would be impracticable to join all of the potential claimants. Although plaintiff has not introduced any specific evidence that there are potential class members that have moved out of the area, the court notes that the likelihood that some of the potential class members are geographically dispersed indicates that it would be impracticable to join these members.

(c). Retaliation

Plaintiffs claim that some of the potential class members may still be employed with the defendants and that fear of retaliation might discourage potential plaintiffs from becoming joined parties in this suit. Plaintiffs have presented evidence through the testimony of plaintiff Sheila Bachemin that some employees failed to complain about the ventilation conditions aboard the vessel for fear of retaliation. *See* Deposition Testimony of Sheila Bachemin at p. 92. Accordingly, plaintiffs have presented evidence that fear of retaliation may dissuade potential class members from filing suit individually.

(d) Conclusion - Numerosity

Plaintiffs have presented evidence that the number of the potential class of plaintiffs will be between 100 to 150 persons, that this number includes members who may be geographically dispersed and that the fear of retaliation may dissuade potential class members from filing suits individually. Therefore, plaintiffs have presented evidence that joinder of all these potential class members is impracticable within the meaning of Rule 23 (a) (1).

2. COMMON QUESTIONS OF LAW OR FACT

Plaintiffs argue that there are common questions of law and fact underlying the proposed class members' potential claims. The proposed class of plaintiffs all seek to recover under the same theories of liability, they all seek the benefits of being Jones Act seamen and although their damages may vary in degree, their alleged damages are similar in kind. The proposed class of plaintiffs all allege that they suffered damage as a result of inhaling second-hand smoke aboard the defendants' vessel. Accordingly, plaintiffs have presented evidence that there are common questions of law and fact underlying their claims.

3. TYPICALITY

Plaintiffs argue that the claims of the representative parties are typical of the claims of the proposed class. The class representatives in this case are the named plaintiffs, Dennis Mullen, Sheila Bachemin, and Margaret Phipps, all of whom claim to have fallen ill with occupational-related respiratory problems while working aboard the M/V Treasure

Chest Casino. The proposed class consists of coworkers of the representative plaintiffs who have been stricken with occupational respiratory illness caused by or exacerbated by the alleged defective ventilation system aboard the M/V Treasure Chest Casino. Accordingly, plaintiffs have presented evidence that the claims of the representative parties are typical of the claims of the proposed class.

4. ADEQUACY OF REPRESENTATION

Plaintiffs argue that the representative parties will fairly and adequately protect the interests of the class. Plaintiffs note that the representative plaintiffs have identical interests with the proposed members of the class. In *Horton v. Goose Creek Ind. Sch. Dist.*, 690 F.2d 470 (5th Cir.), *reh'g denied,* 693 F.2d 524 (1982), and *cert denied,* 103 S.Ct. 3536 (1983), the Fifth circuit noted that "the adequacy requirement [of Rule 23(a)(4)] mandates an inquiry into the zeal and competence of the representative's counsel" as well as "into the willingness and ability of the representative to take an active role in and control the litigation and to protect the interests of the absentees." *Horton,* 690 F.2d at 484. Plaintiffs' attorneys, Scott Bickford and John Martzell, certify that they have represented hundreds of occupational-respiratory Jones Act cases over the past twelve years and have participated in numerous state and federal class-action suits. Accordingly, plaintiffs have presented evidence that the representative parties will fairly and adequately protect the interests of the class.

B. RULE 23(b) (3)[4]

Plaintiffs argue that the questions of law or fact common to the members of the proposed class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the proposed class members' claims.

1. Predominance

The issues of law and fact common to all of the members of the proposed class will be the question of whether the employees of the M/V Treasure Chest Casino are seamen within the meaning of the Jones Act, whether the M/V Treasure Chest Casino is a vessel within the meaning of the Jones Act, whether the M/V Treasure Chest Casino was unseaworthy, and whether the ventilation system of the M/V Treasure Chest Casino was unreasonably suited to protect the proposed class members from harm. The questions of law

---

[4] Plaintiffs also claim that in addition to Rule 23(b)(3), Rule 23(b)(1) provides a basis for certification of the proposed class in this case. However, plaintiffs raise this issue for the first time in their reply memorandum. Issues raised for the first time in a reply memorandum deprive a non-moving party of a meaningful opportunity to respond. *See Springs Indus., Inc. v. American Motorists Ins., Co.*, 137 F.R.D. 238, 229 (N.D.Tex. 1991). Therefore, pursuant to the principal that the basis upon which a movant requests relief must be presented in his memorandum in support of that request, this court does not express any opinion on whether the plaintiffs would be entitled to certification under Rule 23 (b) (1).

affecting only individual members will be whether the members were contributorily negligent, the particular severity of the damages allegedly suffered by the members, and extent to which those damages were caused by the action or inaction of the defendants. In mass tort litigation, the Fifth Circuit has held that for purposes of Rule 23 (b) (3). "a class issue predominates if it constitutes a significant part of the individual cases." *Watson v. Shell Oil Co.*, 979 F.2d 1014, 1022 (5th Cir. 1992). In the present case, the issues of seaman status, vessel status, seaworthiness, and negligence constitute a significant part of the individual cases of the proposed class members. Accordingly, the questions of law or fact common to the members of the proposed class predominate over any questions affecting only individual members.

2. Superiority

In *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), the Fifth Circuit reversed a lower court's class certification, noting that the lower court's finding that a class action was superior to other available methods for the fair and efficient adjudication of the proposed class members' claims was erroneous in light of the managerial problems associated with the claims of the class. *Castano,* 84 F.3d at 746-52. In *Castano,* a district court certified a class consisting of all nicotine-dependent cigarette smokers, their estates, and their relatives. In reversing, the Fifth Circuit noted that the district court failed to adequately consider the managerial problems associated with such a class, such as the "difficult choice of law determinations, subclassing of eight claims with variations in state law, *Erie* guesses, notice to millions of class members, further subclassing to take account of transient plaintiffs, and the difficult procedure for determining who is

nicotine-dependent." *Id.* at 747. The court went on to note that "[c]ases with far fewer manageability problems have given courts pause." *Id.*

In the present case, all of the proposed class members' claims arise under federal maritime law and therefore the difficult choice of law and *Erie* problems present in *Castano* do not exist in this case. Moreover, the proposed class consists of hundreds, rather than millions, of members and therefore the problems associated with notice which were present in *Castano,* do not exist in this case. Plaintiffs propose the following trial plan:

> The class action would include an initial phase in which the liability issues common to all plaintiffs would be tried together. Later if plaintiffs prevailed on liability, the unique issues such as damages (and causation if necessary), would be tried in waves of approximately five plaintiffs at a time.

Because this court has the option of bifurcating the legal and factual questions common to the proposed class from the questions unique to the individual members, this court holds that a class action is superior to other available methods for the fair and efficient adjudication of the proposed class members' claims and that this approach will promote judicial economy and avoid the wasteful, duplicative litigation which would inevitably result if these cases were tried individually.

New Orleans, Louisiana, this 29th day of August, 1997.

/s/_____
MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[Filed September 19, 1997]

No. 96-0052

DENNIS MULLEN, ET AL.	)
Plaintiff,	)
	)
v.	)
	)
TREASURE CHEST CASINO,	)
L.L.C. & BOYD GAMING	)
CORPORATION,	)
Defendant.	)
	)

ORDER

Considering the memoranda of counsel and the applicable law, IT IS ORDERED that defendants' Motion to Certify Order of August 29, 1997 Granting Class Certification for Interlocutory Appeal and for Stay of Proceedings Pursuant to 28 U.S.C. § 1292(b) be and hereby is GRANTED in part and DENIED in part. To the extent that the defendant's request that this court certify its order for interlocutory appeal, this court finds, in accordance with 28 U.S.C. § 1292(b), that its order certifying a class in this case "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Accordingly,

defendants' motion is granted to the extent that it requests an interlocutory appeal. However, to the extent that defendants seek a stay of discovery in this case, defendants' Motion is DENIED.

New Orleans, Louisiana, this 19th day of September, 1997.

/s/_____
MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed September 17, 1999]

No. 97-31189

DENNIS MULLEN,
Plaintiff- Appellee,

v.

TREASURE CHEST CASINO, LLC; ET AL,
Defendants,

TREASURE CHEST CASINO, LLC,
Defendant - Appellant.

DENNIS MULLEN;
SHEILA BACHEMIN;
MARGARET PHIPPS,
Plaintiffs - Appellees,

v.

TREASURE CHEST CASINO, LLC; ET AL,
Defendants,

TREASURE CHEST CASINO,)
LLC,)
Defendant - Appellant.)
)

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING EN BANC

(Opinion 8/19/99, 5 Cir., _____, _____ F.3d)

Before EMILIO M. GARZA, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/_____
United States Circuit Judge

REHG-6a